Supreme Court, U.S.
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NO. 85-587

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

THE STATE OF TEXAS,
Petitioner

v.

TOMMY WAYNE DUNN,
Respondent

REPLY TO THE STATE'S PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

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Respondent respectfully requests that the State's Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas in the case of The State of Texas v. Tommy Wayne Dunn, Number 248-84 in the court below, be denied.

INDEPENDENT STATE GROUNDS

The issue upon which the Court of Criminal Appeals of Texas reversed this cause was decided upon independent State grounds. As was pointed out in the State's petition:

> ". . . This Court has already granted certiorari in *Moran v. Burbine,* a case which presents similar facts and legal issues. The Court of Criminal Appeals acknowledged that fact but proceeded with this cause without waiting for this Court's guidance in *Burbine.*" (Petition, pp. 3-4)

Respondent submits that the Court of Criminal Appeals did not await this Court's decision in *Burbine* because it based its decision on independent state grounds and not because it was in any way attacking this Court's "supremacy." (Petition, p. 4)

The Court of Criminal Appeals recognized that this cause was one of first impression for our state although similar facts had been addressed by other jurisdictions. The Court of Criminal Appeals further recognized that its decision might go further in announcing guidance in similar future circumstances in Texas than the minimum constitutional requirements that might be pronounced by this Court:

> ". . . The analysis of this issue must necessarily begin with the premise that this Court has in the past basically followed the mandates of the Supreme Court of the United States in cases involving custodial interrogation, See, e.g., *Kelly, supra,* including both the state and federal cases chronicled therein. *If we decide to depart from the path laid down by the Supreme Court in a case where an accused has not exercised his right to remain silent or his right to counsel,* we should 'consider the balance of interest between society's need for reasonable law enforcement as against the accused's right to remain silent and to assert his privilege against self-incrimination.' *State v. Burbine,* at pg. 29." (Opinion, p. 10, Appendix, p. 10a)

The Court of Criminal Appeals concluded from the combination of circumstances in this cause that the defendant had not made

> ". . . an intelligent and knowing waiver of his right to consult an attorney and that this confession was obtained in violation of the Fifth Amendment to the United States Constitution and *Art. I, Sec. 10 of the Texas Constitution.*[1] (Opinion p. 15, Appendix p. 15a)

The Concurring opinion by Judge Clinton was more specific about the independent state ground.

> "Nevertheless, believing that the instant opinion will not be the last word on this matter of first impression in this Court and agreeing with the eventual finding of the Court that the confession at issue was secured in violation of rights of appellant under Article I, Sec. 10 of the Constitution of the State of Texas,

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1. Art. I, § 10, of the Texas Constitution
"In all criminal prosecutions the accused shall have a speedy public trial by an impartial jury. He shall have the right to demand the nature and cause of the accusation against him, and to have a copy thereof. He shall not be compelled to give evidence against himself, and shall have the right of being heard by himself or counsel, or both, shall be confronted by the witnesses against him and shall have compulsory process for obtaining witnesses in his favor, except that when the witness resides out of the State and the offense charged is a violation of any of the anti-trust laws of this State, the defendant and the State shall have the right to produce and have the evidence admitted by deposition under such rules and laws as the Legislature may hereafter provide; and no person shall be held to answer for a criminal offense unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army or navy, or in the militia, when in actual service in time of war or public danger."

> I join the judgment (but not the Opinion) of the Court.[2]"
>
> "_____
>
> "2. Since the Supreme Court has yet to decide the question present here, I would not presume to provide an answer under the Fifth Amendment to the Constitution of the United States." (Appendix p. 18a-19a)

Judge Teague in his concurring opinion also recognized the independent state ground and pointed out that similar conduct by law enforcement officers was once a crime under Texas law (Appendix, p. 28a) and has before been held to be "a clear and palpable violation of the [Texas] Constitution and Bill of Rights." (Appendix, p. 28a) Teague differed with the majority as to the test that should be applied in *Texas.*

Judge Miller, concurring, also addressed what the *Texas test* ought to be.

The three dissenting judges did so without opinion.

The issue presented to the Texas Court of Criminal Appeals was how Texas would treat similar circumstances in the future.

> "The questions that are before this Court for resolution are highly important to the *citizens of this State.* Namely, whether *this Court* will give counsel, who is then lawfully and physically present, the right to communicate with an accused person who is then being detained by the police, and is in police custody; does the accused's right to counsel necessarily include the right of counsel to have access to the accused when he is being detained by and in the custody of the police; and will the actions of State Agents, in preventing counsel from communicating

with the accused, prevent a waiver by the accused of his right to the assistance of counsel from becoming effective." (Opinion, Page 22, Appendix, Page 22a).

CONCLUSION

The Court of Criminal Appeals was asked by the appellant to condemn the conduct of the law enforcement officers in this case and to announce a test that would be applicable in Texas in future similar circumstances. Six of the nine Judges agreed that the facts and circumstances of this case constituted a violation of the Texas Constitution. It was with regard to what rule Texas would adopt or draft for future guidance that the judges disagreed.

Thus, whether this Court finds that the Fifth Amendment to the United States Constitution was violated by the circumstances of this case was not the pivotal question before the Texas Court of Criminal Appeals. The Texas Court of Criminal Appeals analyzed and decided this case based upon the Texas Constitution and the policies of the State of Texas in balancing the interests of the accused with the interests of Texas' society and reasonable law enforcement. It is submitted that it is because of the independent state ground that the Court of Criminal Appeals refused to extend the stay of its mandate. The new trial is scheduled for Monday, February 10, 1986.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the Court refuse to grant the State's Petition for Writ of Certiorari to the Texas Court of Criminal Appeals.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Mike DeGeurin, hereby certify that 3 true and correct copies of the above and foregoing Reply to the State's Petition for Writ of Certiorari to the Court of Criminal Appeals of Texas have been sent by U.S. Certified Mail to:

District Attorney of Harris County, Texas
Harris County Courthouse Building
201 Fannin
Houston, Texas 77002

on this the 30th day of January, 1986.

MIKE DEGEURIN